No. 187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

MENOMINEE TRIBE OF INDIANS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Claims

SUPPLEMENTAL BRIEF FOR THE MENOMINEE TRIBE

CHARLES A. HOBBS,
Counsel for Petitioner
1616 H Street, N.W.
Washington 6, D.C.

WILKINSON, CRAGUN & BARKER
JOHN W. CRAGUN
ANGELO A. IADAROLA
FRANCES L. HORN

FOLEY, SAMMOND & LARDNER
JAMES R. MODRALL, III
Of Counsel

WILSON - EFES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 187

MENOMINEE TRIBE OF INDIANS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Claims

SUPPLEMENTAL BRIEF FOR THE MENOMINEE TRIBE

At the oral argument on January 22, 1968, several of the Justices were concerned that the State of Wisconsin was not participating in the oral argument, despite the fact that the State not only had an interest in the outcome, but was the only adversary to the primary position of the Menominee Tribe. Accordingly, on January 29, 1968, the Court ordered that the case be restored to the calendar for rebriefing and reargument, with the State of Wisconsin invited to submit a brief and participate in oral argument.

The call for rebriefing refers to the fact that during the argument of January 22, a number of questions were

asked which were not dealt with at length in the briefs. In response, we have provided herein a Supplemental Statement of Facts, consisting of an analysis of the legislative history of the Menominee Termination Act (pp. 2-9), and a discussion of the Tribe's post-termination activities (pp. 9-13, and see Attachments A and B hereto). We also have presented herein a Supplemental Argument (pp. 13-23), wherein we have attempted to answer, or at least to define our position with respect to the questions raised by the Court.

SUPPLEMENTAL STATEMENT OF FACTS

1. The Legislative History of the Menominee Termination Act

a. *The Menominee Tribe Prior to Termination*

In 1854, under the Treaty of Wolf River between the Menominee Tribe and the United States,[1] the Menominee Tribe acquired its reservation in the following terms:

> ". . . the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held, that tract of country lying upon the Wolf River, in the State of Wisconsin . . . ."

The reservation was part of the territory occupied by the Menominee Tribe since time immemorial,[2] and with one small reduction in 1856,[3] it remained the Menominee

[1] 10 Stat. 1064.

[2] The reservation was entirely within the territorial boundaries claimed by the Menominees in the Treaty of 1831, 7 Stat. 342. However, there is some question whether the northwest corner of the reservation (about a third of the whole) in fact aboriginally belonged to the Chippewas. See 5 Ops.Atty.Gen. 31 (1848), and Royce, Indian Land Cessions (1900), Wisconsin Maps Nos. 1 and 2. This matter was adverted to by the Wisconsin Supreme Court, App. 54, but was not considered to be important. We mention it only for the sake of completeness.

[3] See 11 Stat. 679.

Indian Reservation until the Termination Act became effective in 1961.

It contained some 234,000 acres, which was 95% forest lands. Unlike most Indian reservations, the Menominee Reservation was never divided into "allotments," i.e., prorated among the members of the tribe.[4] It remained wholly tribal property until 1961, when it was conveyed intact to the tribal operating company, Menominee Enterprises Inc.

There was a saw mill on the reservation, owned by the United States in trust for the Tribe. The mill employed several hundred Menominees, and processed and marketed the timber from the Menominee Reservation. The median annual income of the Menominees who worked in the mill was $2,300, while that of those who did not work in the mill was $650. Some 75 families (out of a total of 477) received welfare.[5]

In 1951 the Tribe was awarded $8,500,000 in damages as a result of mismanagement of the tribal forest by federal employees.[6] Largely because of this, the Tribe had some $9,700,000 to its credit in the U.S. Treasury as of October 1, 1953.[7]

Each year the Tribe paid for "all but a small part" of the services provided by the Bureau of Indian Affairs.

---

[4] *Joint Hearings*, 589, 590.

The full citation to these hearings is *Termination of Federal Supervision over Certain Tribes of Indians*, Joint Hearings before Subcommittees of Senate and House Committees on Interior and Insular Affairs, 83d Cong. 2d Sess. (Feb., Mar. and Apr., 1954). The Supreme Court Library serial number is 10996, *et seq.*

[5] *Joint Hearings*, 590.

[6] The award was by settlement, arising from a number of separate dockets. *Menominee Tribe* v. *United States*, 121 Ct.Cl. 492 (1952), 118 Ct.Cl. 290 (1951), 117 Ct.Cl. 442 (1950), *app. dism.* 342 U.S. 801; 107 Ct.Cl. 23 (1946); 102 Ct.Cl. 555 (1945); 101 Ct.Cl. 22 (1944); 101 Ct.Cl. 10 (1944).

[7] *Joint Hearings*, 590.

For example, it financed its own tribal law and order system.[8]

The members of the Tribe were those enrolled under the 1934 Enrollment Act.[9] Descendants born thereafter were eligible for enrollment if they were at least one-quarter Menominee blood, whose parents (at least one of whom was an enrolled member) were residents of the reservation at the time of the child's birth.[10] The 1954 final roll showed 3,257 enrolled members.[11]

b. *Per Capita Bill, 82d Congress*

The Tribe wanted to distribute some of its $8,500,000 judgment in per capita payments to its members, and accordingly it caused S.2969 and H.R. 7104 [12] to be introduced in Congress in 1952. These bills authorized a per capita payment of $1,000 to each tribal member. The Department of the Interior recommended against passage of the per capita bills, because it wanted the Tribe to commit itself to termination of federal supervision.[13] The 82d Congress adjourned without taking action on the bills.

c. *Per Capita Bill (H.R. 2828), 83d Congress, 1st Session*

In February, 1953, the per capita bill was reintroduced as H.R. 2828, 83d Congress! This time the Department of the Interior recommended enactment, with the comment that a termination plan should be drafted.[14] The

---

[8] Id.

[9] 48 Stat. 965, as amended, 53 Stat. 1003 (1939).

[10] Discussed at *Joint Hearings*, 591-593.

[11] See note 48 below.

[12] 82d Cong. 2d Sess. See H.Rept. 2308 (1952).

[13] *Joint Hearings*, 608.

[14] Id. at 609.

bill was duly passed by the House and sent to the Senate.[15]

A tribal delegation met with Senator Arthur V. Watkins of Utah, Chairman of the Subcommittee on Indian Affairs, Senate Interior and Insular Affairs Committee. Senator Watkins advised them that no per capita bill would be enacted unless the Tribe agreed to termination of federal trusteeship.[16] The Indian delegates had no authority to agree to this, so they invited the Senator to visit the Tribe and explain his reasoning to the members, which he did on June 20, 1953. He advised the members that termination was coming whether they liked it or not, and that no per capita bill would be enacted until they agreed to termination.[17] The Tribe by a vote of 169 to 5 agreed to accept termination of federal supervision.[18]

d. *Revision of H.R. 2828, 83d Congress, 2d Session*

Thereafter, H.R. 2828 was redrafted by the Interior Department at Senator Watkin's request,[19] to convert it into a termination bill. Without any hearings being held, the redrafted bill was reported by the Senate Subcommittee[20] and passed by the Senate.[21] The Senate-House conference committee approved the Senate version,[22] but upon Congressman Laird's objection the House refused to pass it.[23]

---

[15] See H.Rept. 371, 83d Cong. 1st Sess. (1953).

[16] *Joint Hearings*, 594, 609, 695, 99 Cong.Rec. 10940 (1953).

[17] Id.

[18] 99 Cong.Rec. 9745 (1953).

[19] 99 Cong.Rec. 10932 (1953); 100 Cong.Rec. 8538 (1954).

[20] See S.Rept. 590, 83d Cong. 1st Sess. (1953).

[21] 99 Cong.Rec. 9746 (1953).

[22] H.Rept. 1034, 83d Cong. 1st Sess. (1953).

[23] 99 Cong.Rec. 10942 (1953). There was extensive debate on the matter. 99 Cong.Rec. 10930-42 (1953).

Early the following year, the Tribe caused its own termination bill to be introduced, S.2813 (and identical H.R. 7135), which met some of the Tribe's objections to H.R. 2828 as passed by the Senate.[24] Hunting and fishing rights were expressly protected in the Tribe's bill.

e. Termination Hearings

Termination of federal supervision over Indian tribes generally was the subject of much attention in 1953 and 1954.[25] The Interior Department drafted a number of termination bills for various tribes, and these were introduced early in 1954.[26] Extensive hearings on these bills, and the Menominee bills, were held in February, March and April, 1954, before a joint committee of the Senate and House Subcommittees on Indian Affairs.[27] The hearings were joint, Senator Watkins said, to avoid the necessity of duplicating the testimony.[28] The hearings opened on February 15, 1954, and reached the Menominee bills on March 10.

After the hearings, a second Senate-House conference considered H.R.2828 again, and approved it,[29] and on June 17, 1954, it became law, in substantially the form as originally redrafted at Senator Watkins' behest.[30] The

---

[24] *Joint Hearings*, 737.

[25] Termination was a plank of the Republican platform in 1952. 99 Cong.Rec. 10932, 10933 (1953). See also H.Con.Res. 108, 83d Cong. 1st Sess., 67 Stat. B-132 (1953).

[26] All 83d Cong. 2d Sess.: H.R. 7316, Turtle Mountain Band of Chippewas; H.R. 7317, Indians in Western Oregon; H.R. 7318, Sac and Fox and other tribes in Kansas; H.R. 7319, Flatheads of Montana; H.R. 7320, Klamaths of Oregon; H.R. 7321, Seminoles of Florida; H.R. 7322, Indians of California; H.R. 7552, Certain Indians in Nevada; H.R. 7674, Certain Indians in Utah; S.2744, Alabama and Coushatta Indians of Texas.

[27] See full citation to the hearings at note 4 above.

[28] *Joint Hearings*, 1.

[29] H.(Conf.)Rept. 1757, 83d Cong. 2d Sess. (1954).

[30] 68 Stat. 250, 25 U.S.C. §§891-902.

deadline for termination of federal supervision was set for December 31, 1958.

It may be noted that in the same year (1954) federal supervision over four other Indian groups was terminated.[31] In 1956 two more groups were terminated,[32] and thereafter two were terminated in 1958, one in 1959 and one in 1962.[33] No tribe has since been terminated.

f. *Amendments to the Menominee Termination Act*

The Menominee Termination Act was amended in 1956 to authorize the federal government to pay for the cost of termination (under the original act the Tribe had to pay).[34] It was amended again the same year to require that the forest be managed on sustained yield principles, to set a deadline on submission of a tribal termination plan, and to authorize the Secretary to convey certain government property to the Tribe.[35]

The Act was amended again in 1958 to require that the Tribe pay some of the termination expenses, and to extend the deadline for termination.[36]

The Act was amended again in 1960 to extend the deadline for termination an additional four months, to April

---

[31] Klamath Tribes, 68 Stat. 718, 25 U.S.C. § 564; Mixed Blood Utes, 68 Stat. 868, 25 U.S.C. § 677; Paiute Tribes, 68 Stat. 1099, 25 U.S.C. § 741; and Grand Rondes Indians, 68 Stat. 724, 25 U.S.C. § 691.

[32] Ottawa Tribe, 70 Stat. 693, 25 U.S.C. § 841; Wyandotte Tribe, 70 Stat. 893, 25 U.S.C. § 791.

[33] Peoria Tribe, 70 Stat. 937, 25 U.S.C. § 821 (1958); Certain California Rancherias, 72 Stat. 619 (1958); Choctaw Tribe, 73 Stat. 420 (1959); Ponca Tribe, 76 Stat. 429, 25 U.S.C. § 971 (1962).

[34] 70 Stat. 544, see H.Rept. 2235 and S. Rept. 2411, 84th Cong. 2d Sess. (1956).

[35] 70 Stat. 549, see H.Rept. 2246 and S.Rept. 2412, 84th Cong. 2d Sess. (1956).

[36] 72 Stat. 290, see H.Rept. 1013, S.Rept. 1116, 85th Cong. 1st Sess., and H.(Conf.) Rept. 1866, 85th Cong. 2d Sess. (1958).

30, 1961.[37] This deadline was met, and on April 26, 1961, the Secretary proclaimed the end of federal supervision.[38]

g. *The Tribe's Plan of Termination*

Shortly after the Menominee Termination Act was enacted in 1954, the Tribe set out to piece together a plan of termination which would meet with the approval of the State and Federal governments. The plan finally adopted[39] was that the reservation would become a county under the organic laws of Wisconsin, with the same type of municipal government as the other counties in Wisconsin. Wisconsin laws and court jurisdiction already applied to the reservation under Public Law 280[40] (which, it may be noted, expressly exempted hunting and fishing rights from state regulation).

A stock corporation, called Menominee Enterprises Inc., would be formed, and the Menominee forest and the saw mill would be transferred from the United States to the stock corporation.[41]

The corporation's stockholders would be the 3,270 Menominees on the final roll, each of whom would receive 100 shares of common stock, par value one dollar. Their voting rights would be exercised by a voting trust, whose trustees would include four Menominees and three non-Indians. Each Menominee would also receive a 4% income bond with a face value of $3,000. The corporation's

---

[37] 74 Stat. 867. See H.Rept. 1824, S.Rept. 1907, 86th Cong. 2d Sess. (1960), and see 1960 Amendments to the Menominee Indian Termination Act, Hearings on H.R. 11813, Before Subcommittee on Indian Affairs, Senate Committee on Interior and Insular Affairs (August 16 and 17, 1960).

[38] 26 Fed.Reg. 3726.

[39] Published at 26 Fed.Reg. 3726-3755 (1951).

[40] 18 U.S.C. § 1162, 28 U.S.C. § 1360; 67 Stat. 588 (1953), amended to apply to Menominee Reservation, 68 Stat. 795, S.Rept. 2223, H.Rept. 2322, 83d Cong. 2d Sess. (1954).

[41] 26 Fed.Reg. 3728.

board of directors initially was to include four Menominees and five non-Indians.[42]

The interests of minors, persons non compos mentis, and those otherwise deemed in need of assistance, would be owned by the First Wisconsin Trust Company as trustee.[43]

The stock (represented by voting trust certificates) was subject to restrictions designed to keep it in Indian hands. The Corporation, and then the State of Wisconsin, had a right of first refusal in the event of a proposed sale.[44] The restrictions were to run until January 1, 1981.[45]

The bonds, due December 1, 2000, were also subject to restrictions.[46] The corporations could sell land for a residence to a bondholder and accept the bond as payment.[47]

The membership roll was brought up to date and the final roll was approved by the Secretary of the Interior and published on December 12, 1957.[48] It contained 3,270 names.

2. Post-Termination Activities of the Tribe

a. *Formation of the Tribal Corporation*

Since termination of federal supervision, the Tribe has continued to meet and make decisions as a tribe, and has held itself separate and distinct from Menominee Enterprises Inc., which was the holding and operating entity. In 1962 the Tribe's members set up a membership

---

[42] Id. at 3729 and 3728.

[43] Id. at 3728.

[44] Id. at 3736.

[45] Id. at 3737.

[46] Id. at 3742.

[47] Id. at 3745.

[48] 22 Fed.Reg. 9951 (1957).

corporation under the laws of Wisconsin (see Articles, pp. A1-A11 below). The background to the tribal corporation is as follows.

On March 17, 1962, there was a meeting of the "Menominee Tribal Members" (p. B1 below). The Chairman, Lawrence Richmond, a member of the Tribe (like all others quoted in this section), explained the purpose of the meeting (p. B3):

> "The proposed plan for your consideration involves organizing a non-profit, non-stock corporation composed of tribal members, through a voluntary membership basis in the organization. Basically, the new organization is designed to provide for the re-establishment of the Menominee Indians of Wisconsin, to protect and preserve their identity, their cultures, customs, traditions, legends, language, crafts and to reserve such other inherent rights from former treaties with the United States and for other purposes."

Al Dodge said (p. B3) ". . . at the present time we are under State authority, but our inherent rights from our ancestors and forefathers are in jeopardy, such as fishing and hunting, trapping; and that we inherited ownership of these rights which the State now is attempting to take away. Thus through this type of group organization we can be able to assert ourselves to interested parties and officiela [sic]."

The minutes record that "The Chairman indicated that this new organization should not be confused with the Enterprise, that it was separate, and, this is a group of Menominees, for Menominees, where complaints could be registered legally." (p. B4).

The proposal to form a membership corporation was adopted by a vote of 94 to 0 (p. B6), and a drafting committee was elected.

On March 21, 1962, the drafting committee met. Hilary Waukau said he believed that (p. B9):

> ". . . many of the documents already in existence stated in broad terms many of the "inherent rights" and that this organization should look toward spelling out the specific rights, especially in the areas of hunting and fishing."

On May 9, 1962, the General Council of the Menominee Tribe [49] met and approved the Articles of Incorporation and Bylaws of the "Menominee Indian Tribe of Wisconsin, Inc." The Articles are fully reprinted below, pp. A1-A11.

These articles generally preserve the traditional structure of the Tribe under its 1928 constitution. It is a non-profit membership corporation under the laws of Wisconsin. There are members and associate members; members under 21 years of age and associate members are not allowed to vote (pp. A8-A9). A quorum of 75 is required at meetings of members (same as under the 1928 tribal constitution), and the 12-man board of directors is called the Council of Chiefs (under the 1928 tribal constitution it was called the Advisory Council) (p. A6).

The corporation became effective on May 9, 1962, when the Articles were filed with the Secretary of State of Wisconsin.

b. *Meetings of the Tribal Corporation*

The Council of Chiefs met on June 6, 1962, to discuss an opinion by Wisconsin Attorney General Reynolds that the Menominees were now subject to state hunting and fishing regulations. It was resolved to ask the Board of Directors of Menominee Enterprises Inc. to contest this opinion (pp. B10-B11).

---

[49] This is the traditional Menominee governing body, composed of all adult members of the Tribe, roughly equivalent to a New England town meeting.

At another meeting (date unknown) the Council of Chiefs called for a "mass meeting" on the hunting and fishing situation (pp. B11-B12), which was held on October 12, 1962 (pp. B12-B13). The meeting voted to authorize (pp. B15-B16):

> ". . . the Menominee Indian Tribe of Wisconsin, Inc. to commence such legal action necessary or otherwise, in the Federal Courts of the United States, seeking a remedy from the adverse opinion rendered by the Attorney General of Wisconsin relating to hunting, fishing and trapping rights the Menominees declare as inherent property rights, which opinion denies these rights. . . ."

The members of the Menominee Tribe of Wisconsin, Inc., met on March 16, 1968 (p. B17), and by a vote of 100 to 4 changed the rules on membership in the Articles of Incorporation to include all members' descendants who met the criteria of the Enrollment Act of 1934;[50] that is, to include descendants with at least one-quarter Menominee blood, one or both of whose parents resided on the Menominee Reservation at the time of the descendant's birth.

The members also adopted resolutions calling for updating the tribal roll annually (p. B18), continuing the policy of sound game and fish conservation practices (p. B19),[51] forbidding commercial transactions in connection with exercise of tribal hunting and fishing rights (p. B19), and defining those persons entitled to exercise

---

[50] 48 Stat. 965, as amended, 53 Stat. 1003, see note 9 above.

[51] The Menominees have long been concerned with conservation. In 1948 a bill was introduced in Congress authorizing the General Council to adopt a hunting and fishing code for their reservation, and making violation of the code a federal misdemeanor. H.R. 5300, 80th Cong. 2d Sess. On November 12, 1957, the tribal Advisory Council established a conservation court and certain conservation ordinances, which in view of impending termination were never put into effect.

the rights (p. B18). The latter resolution reads as follows:

> "All tribal members, as defined in Article X of the Articles of Incorporation, Section 1(a), and only such members, shall have the right to exercise tribal hunting and fishing rights, subject to tribal regulations;
>
> "PROVIDED, HOWEVER, that any member who violates any tribal hunting or fishing regulation may upon finding of the Council of Chiefs be declared ineligible to exercise such rights, for such period of time as the Council of Chiefs may specify."

It is noted that upon a declaration of ineligibility, the member would be fully subject to State hunting and fishing regulations, including license fees, seasons and bag limits.

SUPPLEMENTAL ARGUMENT

1. Discussion in Response to Questions Raised by the Justices

a. *The Tribe Still Owns the Rights*

Several of the Justices wanted to know who owns the hunting and fishing rights now. The Tribe? Menominee Enterprises, Inc.? We think it is clear that the Tribe owns the rights, simply because it never lost them. The Government argued below (but not here) that the Tribe was extinguished, but as we show at pp. 16-19 below, the Tribe suryives. Its sovereignty as a political entity may have been curtailed, and its most valuable property, the forest, has been transferred to Menominee Enterprises Inc. But as shown at pp. 9-13 above, the Tribe continues as a real entity—it has incorporated itself as a membership corporation, it holds General Council meetings, it makes decisions affecting its welfare, and it owns and supervises its property including its hunting and fishing rights.

Mr. Justice Fortas's tentative impression was that Menominee Enterprises Inc., not the Tribe, would own any hunting and fishing rights, because the Act contemplated that all tribal property was to be conveyed to Menominee Enterprises. This is not so. The Act provides for the conveyance to Menominee Enterprises of ". . . the title to all property, real and personal, *held in trust by the United States* for the tribe." [52] (Emphasis added.) I.e., only *trust* property was to be conveyed.

The hunting and fishing rights are not included in that trust property; they are rights to engage in certain conduct without outside interference. Title was never in the United States, but was always in the Tribe, by aboriginal user prior to 1854, and thereafter by treaty guarantee as well. The United States could not convey such rights to Menominee Enterprises or anyone else, because the United States did not have legal title to them. The rights are inherently inconsistent with any supervisory powers in the United States, and as we show at pp. 19-20 below, the United States did not have the authority to interfere with the use and enjoyment of these rights, at least not without paying just compensation. So far as we know, the United States did not consider these rights to be part of the trust corpus, and the two deeds by which the tribal property was transferred to Menominee Enterprises, Inc. are silent with respect to hunting or fishing rights.[53]

By way of analogy, we note that the Quinault Tribe of Washington (a non-terminated tribe) sells fishing licenses to sportsmen, and retains the proceeds in its own unre-

---

[52] 25 U.S.C. § 897.

[53] App. 6-7.

[53] The deeds are dated the same day as the Secretary's proclamation, April 26, 1961, 26 Fed.Reg. 3726; they are not published as an attachment thereto, though the covenants in the deed conveying forest land appear at p. 3729. One deed conveys forest land, and the other conveys non-forest land. The language of the proclamation is the same as the Act, referring only to conveyance of *trust* property.

stricted bank account, over which the United States exercises no trust supervision. Likewise, the Tribe buys steelhead salmon from its members, and ships them across the State of Washington, where sale is illegal, to Oregon, where sale is legal. This has been upheld.[54] These proceeds also go into the Tribe's own unrestricted bank account. If the United States regarded the Quinault fishing rights as trust property, the proceeds logically would go into the tribal trust account, like proceeds from sale of tribal lands.

b. *The Scope of the Rights*

What is the scope of the rights with respect to intensity of use? It would be presumptuous for us to attempt to voyage too far into uncharted seas, but certainly as a minimum, the rights would include the right to hunt and fish to the extent practiced in 1854. That is, to catch at least all the deer, trout, etc. necessary to feed one's family, and to barter for other commodities. We need claim no more in this case, for the Indians whose arrest originally gave rise to this litigation were not shown to have been hunting to any extent in excess of the minimum suggested. We note that the kind of fish and game found on the Menominee Reservation is not readily subject to commercial exploitation on any large scale. We would, however, argue against restricting the rights to aboriginal methods such as bow and arrow, because any legitimate public interest in restricting the rights centers on quantity, not method.

With respect to the duration of the rights, we would concede that the rights are peculiarly Indian in nature, and arise out of Indian culture and traditions, and would therefore not outlast the Menominee Tribe as an Indian entity. We do not presume to suggest what sociological, ethnological, or other factors might constitute the termination of the Tribe as an Indian entity, but are confident that when that day appears to have arrived, a court will

---

[54] *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 Pac. 557 (1930).

be able to cope with the problem, as it does other complex matters.

With respect to geographic extent, we would concede that the rights are limited to the boundaries of the 1854 reservation.

With respect to the alienability of the hunting and fishing rights, we would concede that the rights, to the extent they constitute an immunity from state regulation, may not be conferred on a non-Indian. It is settled law that a non-Indian remains subject to state hunting and fishing regulations when he comes on an Indian reservation.[55] We would note, however, that identification as an Indian is not, or at least should not be, necessarily a matter of blood quantum, but may arise from affiliation with a tribe on a permanent basis and practicing its customs and sharing its community life.[56] In other words, the Tribe, if it wished, could adopt as members persons without Indian blood who fit the above criteria.[57] On the other hand, we would not expect a court to recognize the immunity of a person who did not in any sense meet those or similar criteria, whether or not the Tribe had declared him to be a member.

2. The Termination Act Did Not Extinguish the Tribe

Several of the Justices asked questions the answers to which depended on whether the Tribe as such has been extinguished. The Court of Claims below held that the Act contemplated a continuation of the Tribe. The Court said:[58]

> "It is clear from the wording of the various sections of the Termination Act itself that it was contem-

---

[55] *Draper* v. *United States*, 164 U.S. 240 (1896); *Ex parte Crosby*, 38 Nev. 389, 149 Pac. 989 (1915); *Federal Indian Law*, 324-325.

[56] For a discussion of the definition of an "Indian," see *Federal Indian Law* 4-12.

[57] A tribe has the authority to define its membership. *Federal Indian Law* 90, 43-44, 414, 419.

[58] App. 6-7.

> plated the Menominee tribe would continue in existence after the Act became effective. . . . The Termination Act did not abolish the *tribe* or its membership. It merely terminated Federal supervision over and responsibility for the property and members of the tribe."

We think a fair reading of the face of the statute compels the conclusion reached by the Court of Claims. The very title of the Act explains that it is an act "To authorize the withdrawal of the Menominee Tribe from Federal jurisdiction." [59] This is not language terminating the Tribe; it is merely language cancelling federal responsibilities.

The authoritative government textbook, *Federal Indian Law*, states: [60]

> "Termination of tribal existence is to be distinguished, of course, from termination of Federal supervision of various tribes as provided by recent acts of Congress. Development of the Indians' property to full utilization, and encouragement of the Indians to accept responsibility for its management, are the proper goals of Indian administration rather than continued Federal protective guardianship. They are the means by which the United States, within a reasonable time, may withdraw from its historic role and terminate its trusteeship. *Whether or not the Indians concerned thereafter continue to live in tribal relationship, will be a matter for them to decide.*" (Emphasis added.)

---

[59] 68 Stat. 250 (1954) See also Section 1 of the Act, which declares that the purpose is "to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin."

[60] Department of the Interior, *Federal Indian Law*, 464 (1958). See also, pp. 464-468, concerning the many attempts by Congress to terminate a tribe which have proved "abortive," and see p. 468: "They [Congressional attempts] also point to the reasons for the judicial rule that an exercise of the Federal power to dissolve a tribe must be demonstrated by statutory or treaty provisions which are positive and unambiguous."

At the hearings on the termination bills in February, 1954, Representative d'Ewart stated (referring to the Klamath bill) : [61]

> "This bill contemplates, though, that the tribe as an entirety shall go on after the enactment of this legislation and the division of the assets."

And Associate Commissioner of Indian Affairs H. Rex Lee replied:

> "Well, it would be entirely up to the Indians as to whether they wanted to go on as a tribe, or what they wanted to do."

And Bureau of Indian Affairs Program Counsel Lewis Sigler added: [62]

> "So far as the drafting of this bill is concerned, though, it was our intention to avoid any express statement that would suggest that the tribe would cease to exist as a tribal entity."

It is true that the foregoing colloquy was addressed to the Klamath termination, not the Menominee termination, and the two situations were not precisely identical. One difference was that the Menominees elected that their trust property be owned and managed by their own stock corporation, whereas the Klamaths elected that their trust property be owned and managed by an outside trustee, the United States National Bank of Portland. Another difference was that the Klamaths were given the opportunity to withdraw from the tribe and be paid their share of the tribal estate (i.e., individual termination),[63] whereas the Menominees did not have this option. But basically the two situations were the same, and the fore-

---

[61] *Joint Hearings*, 253.

[62] Id. at 255.

[63] 25 U.S.C. § 564(d)(2). Pursuant to this clause, about 78% of the Klamath members withdrew, and received over $40,000 each. Having withdrawn from the tribe they have no further tribal rights, such as the hunting and fishing rights. Most of the withdrawees are destitute today.

going colloquy reveals an intent which applies to the Menominees the same as to the Klamaths.

The Menominee roll was of course closed by the Termination Act,[64] but that is frequently done by Congress when tribal property is to be distributed, and by itself has nothing to do with whether a tribe is at the same time being terminated.[65] As *Federal Indian Law* says, "These [final rolls] may be final for the purpose of distributing tribal property but not for the purpose of controlling internal tribal functions." [66]

If Congress had intended to terminate the Tribe, and designate Menominee Enterprises as its successor, it had only to say, as it did in the Choctaw Termination Act, that the legal entity set up by the tribe "shall be the successor in interest to the Choctaw Tribe for all purposes." [67]

3. Prior to Termination the United States Had No Authority to Restrict the Tribe's Aboriginal Hunting and Fishing Customs

One of the Justices asked to what extent the United States prior to termination could restrict the Tribe's hunting and fishing rights, which would throw some light on what authority the State now has in that regard.

---

[64] 25 U.S.C. § 893.

[65] For example, under 34 Stat. 539 (1906) Sec. 1, the Osage roll was closed and all tribal property (land and mineral rights) divided among the enrollees. The Osages are very much a tribe today. See also 34 Stat. 1035 (1907), amended 41 Stat. 16, with respect to the Blackfeet Tribe, also very much alive today. The Confederated Salish and Kootenai Tribes of the Flathead reservation had a "final roll" prepared under the general authorization of 25 U.S.C. § 162, 163; see special legislation Act of May 31, 1924, 43 Stat. 246; yet those Tribes were the first to organize under the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and continue to own substantial and important properties. Cf. *Montana Power Co. (Confederated Tribes, Intervenor)* v. *F.P.C.*, 298 F.2d 335 (D.C. Cir. 1962).

[66] At pp. 414-415.

[67] 73 Stat. 420, 422 (1959).

Our position is that prior to termination, the United States had no authority as guardian to interfere with the Tribe's aboriginal hunting and fishing customs, because they were not ordinary conduct, but were conduct freedom to practice which was guaranteed by treaty.

Such few cases as there are seem to recognize this concept. For example, in *Mason* v. *Sams*,[68] the court held that the Secretary of the Interior had no authority to regulate fishing by the Quinault Indians on their own reservation. In *United States* v. *Cutler*,[69] the court held that the Migratory Bird Act restrictions did not apply to a Shoshone Indian hunting on his own reservation. Incidentally, in neither of those cases did the treaty expressly protect hunting and fishing rights inside the reservations.[69a]

But even if we are wrong, and the federal government did have some authority under its role as general guardian of the Tribe, to supervise the Tribe's hunting and fishing, the State would not have the same authority, because the State has no role as guardian to protect the ward from mismanagement of his property.

We are aware, of course, that Congress had (and still has) the constitutional *power* to impose restrictions,[70] but to the extent the exercise of that power reduced vested treaty rights, it would give rise to an obligation to pay just compensation.[71] The State of Wisconsin would not have this power, because the right arises from an unabrogated federal treaty, with which the State cannot interfere.

---

[68] 5 F.2d 255 (W.D. Wash. 1925).

[69] 37 F.Supp. 724 (D. Ida. 1941).

[69a] The *Cutler* court assumed, apparently erroneously, that the Shoshones' express off-reservation hunting rights applied inside the reservation.

[70] *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903); *Federal Indian Law*, 499 (1958).

[71] *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497 (1937).

4. Supplemental Material Bearing on the Argument That The Termination Act Did Not Abrogate the Treaty Right to Hunt and Fish

Further research into the termination hearings has revealed certain colloquies which further support our argument (main brief, p. 20) that the Menominee Termination Act did not abrogate tribal hunting and fishing rights.

In the hearings on the Flathead Termination bill, which took place February 25, 26 and 27, 1954 (shortly before the Menominee bills were reached on March 10), Senator Mansfield expressed concern that the Indians' Treaty rights would be fully protected. Mr. H. Rex Lee (Associate Commissioner of Indian Affairs) replied: [72]

> "I might say at this point that the Commissioner felt very strongly that we should put nothing in any of these bills or make any proposal that would violate any Indian treaty. And he specifically gave his entire staff that instruction."

And in the hearings on the Klamath Termination bill, February 23 and 24, 1954, a colloquy occurred,[73] clearly reflecting an understanding that hunting and fishing rights would not be abrogated. This colloquy is fully reprinted as Attachment C below, pp. C1-C2. The following excerpts are enough to convey its sense:

> "[By Associate Commissioner of Indian Affairs, H. Rex Lee:] Now, in terms of the fishing and hunting rights, I think that is a little different. I can anticipate a little difficulty on the part of the local officials out there maybe 25 or 50 or 75 years from now, trying to determine who has hunting and fishing rights.
>
> * * * *

---

[72] *Joint Hearings*, 890.

[73] Id. at pp. 254-5.

"Senator WATKINS. I would suggest that possibly it might be a good idea for the United States to buy out that so-called right to pay them off, because then you would not have difficulty with the white people in those areas. If we go on 25 or 50 years from now and we have a large increase in Indians, and they have just a trace of Indian blood, and claim that 'as a descendant of so-and-so, I claim the right to fish and hunt'—there would be the question of who did have the right to fish and hunt. Under those circumstances, it might pay to negotiate it with them to buy it out, pay them off completely, and put them all on the same basis.

* * * * *

"Mr. LEE. I would certainly agree with you that it is worth exploring, that is, the possibility of buying out those rights. I think that is something that you people have to consider and decide on.

"We have this proviso in here simply because we do have a treaty obligation, and we have no authority at the present time to work out from under that. Neither do we want to be in a position of recommending that a treaty right be violated. But if the Congress decides that they would like to try and commute this treaty right and make a lump-sum payment for it, then we would have to go back and negotiate with the Indians to see whether or not such a settlement were possible or satisfactory."

The foregoing colloquy shows that the speakers assumed that the Klamaths had treaty hunting and fishing rights which the Tribe would continue to own after termination of federal supervision. Note that the speakers made no distinction between hunting and fishing rights, though the Klamath Treaty expressly protected only fishing rights.[74] As later litigation revealed, the Klamath treaty did protect hunting rights as well as fishing

[74] This point is discussed in our main brief, pp. 19-20.

rights.[75] The Menominee hunting and fishing rights stand on the same footing as the Klamath hunting rights.

As to the Menominee Termination Act, Senator Watkins, the father of the bill, said upon the occasion of the signing of the bill,[76]

> "The bill in no way violates any treaty obligation with this tribe."

CONCLUSION

For the foregoing reasons the judgment of the Court of Claims below should be affirmed on the rationale that the Menominee Tribe survives and still owns its hunting and fishing rights.

Respectfully submitted,

CHARLES A. HOBBS,
Counsel for Petitioner

WILKINSON, CRAGUN & BARKER
JOHN W. CRAGUN
ANGELO A. IADAROLA
FRANCES L. HORN

FOLEY, SAMMOND & LARDNER
JAMES R. MODRALL, III
Of Counsel

April 8, 1968.

---

[75] *Klamath & Modoc Tribes* v. *Maison*, 139 F.Supp. 634 (D.Ore. 1956), and *State* v. *Pearson* (Klamath County District Court, 1961, unreported; reprinted at p. 70 of our petition for certiorari), both cases discussed in our main brief, p. 19.

[76] 100 Cong. Rec. 8538 (1954).